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NO. 85-1283

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1985

MARY HAYSSEN, ALLAN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON, and EDWARD HARTNETT,

Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA,

Respondent.
_____/

LOREN M. BERRY,

Real Party in Interest.
_____/

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Does this case merit consideration by the Court in light of subsequently enacted state legislation which now requires notice by mail?

2. Is this case moot because petitioners cannot obtain either equitable relief or monetary damages?

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STATEMENT OF THE CASE

This is an action under 42 U.S.C. §1983 for equitable relief from Sonoma County's allegedly unconstitutional procedure for giving notice of use permit hearings.

Any inaccuracies and omissions in the Petition's Statement of the Case are not addressed at this time, since the ensuing argument concerns lack of public importance and mootness, rather than the merits of the Petition.

REASONS FOR NOT EXERCISING POWER OF REVIEW

I

THIS CASE DOES NOT PRESENT ISSUES OF GENERA OR PUBLIC IMPORTANCE, DUE TO SUBSEQUENT ENACTMENT OF A STATUTE CURING THE ALLEGED CONSTITUTIONAL DEFECT.

The issue presented by the petition for writ of certiorari is whether notice by mail is constitutionally required in a land use adjudication.

Since the action complained of here, the California Legislature enacted a statute requiring mailed notice of hearings for conditional use permits:

> "Notice of the hearing shall be mailed or delivered at least 10 days prior to the hearing to all owners of real property as shown on the latest equalized assessment roll within 300 feet of the real property that is the subject of the hearing. In lieu of utilizing the assessment roll, the local agency may utilize records of the county assessor or tax collector which contain more recent information than the assessment roll. If the number of owners to whom notice would be mailed or delivered pursuant to this paragraph or paragraph (1) is greater than 1,000, a local agency, in lieu of mailed or delivered notice, may provide notice by placing a display advertisement of at least one-eighth page in at least one newspaper of

> general circulation within the local agency in which the proceeding is conducted at least 10 days prior to the hearing."
>
> Government Code §65091(3) (enacted 1984)[1]

In addition to notice by mail, posting or publication is also required. Government Code §65091(4). §65091 applies to applications for conditional use permits (Government Code §65905)

Under the standards governing this Court's power of review, the present case is an inappropriate vehicle for exercise of the Court's discretionary jurisdiction. Supreme Court Rule 17 requires that the Court's jurisdiction be exercised "only when there are special and important reasons" therefor. In order to justify the establishment of Circuit Courts of Appeal in 1891, it was necessary to view certiorari as "a power

[1]The Court of Appeal in its decision noted the enactment of the statute requiring mailed notice. (Opinion at p. 9, Appendix A, to Petition.)

which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise". Forsyth v. Hammond 166 U.S. 506, 514-515 (1897).

The Court's discretionary jurisdiction enables it to discharge its indispensible functions while relieving it of the duty of adjudication in cases that are important only to the litigants. Accordingly, the writ of certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties..." Layne & Bowler Corp. v. Western Well Works, Inc. 261 U.S. 387, 393 (1923). Thus, the cornerstone for a petition for certiorari is a showing that the question to be reviewed is one of general importance.

The enactment of Government Code §65091 resolves the constitutional issue urged by petitioners. Notice by mail to adjacent and nearby landowners is now required in California. Therefore, the present case no longer has any general or public importance. In similar circumstances, this Court has refused to exercise its jurisdiction to decide an issue. In Rice v. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70 (1955) plaintiff brought an action for damages for defendant cemetery's refusal to bury her husband, an Indian. The issue presented was whether the Fourteenth Amendment prohibited a state court from entertaining a defense based on a racially restrictive covenant. Subsequent to commencement of the litigation, the state enacted a statute prohibiting the conduct in question. After full briefing and argument, this Court dismissed the Writ as improvidently granted because the corrective legislation reduced the case to one of "isolated significance". (Id. at 76.) The Court stated:

> "[T]his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted]. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." (Id. at 74.)

Many times this Court has declined jurisdiction due to subsequent statutory changes. See Paulussen v. Herion 86 Daily Journal DAR 1062 (March 25, 1986) (enactment of new state statute of limitations of uncertain application; Court declined to address federal issue "until it is clearly necessary to do so"); Kremens v. Bartley 431 U.S. 119 (1977) (new statute enacted after Supreme Court noted probable jurisdiction completely repealed provisions declared unconstitutional below; remanded for reconsideration of class definition, so as to exclude moot claims); Cook v. Hudson 429 U.S. 165 (1976) (since grant of certiorari, Supreme Court decision and new state statute prohibit the conduct complained of; writ

dismissed as improvidently granted): Hall v. Beals 396 U.S. 45 (1969)(statutory amendment reducing voter's residency requirement rendered the case moot). Where the issue sought to be reviewed concerns a statute that has been repealed, the issue does not merit consideration by the Supreme Court. District of Columbia v. Sweeney 310 U.S. 631 (1940) (cert denied "in view of the fact that the tax is laid under a statute that has been repealed and the question is therefore not of public importance").

Similarly, this principle of restraint is also applied where subsequent judicial decisions render the constitutional issue problematic. New York v. Uplinger 467 U.S. 246 (1984) (writ dismissed after full briefing and argument); Piccirillo v. New York 400 U.S. 548 (1971).

Petitioners argue that this case "should not establish a mold for the future". (Petition, p. 29) Obviously, it does not. Government Code §65091 prevents the present issue from

arising again in California, and reduces Petitioners' action to one of isolated significance. Thus, this case has no general public importance and does not merit review by this Court.

II

THIS CASE IS MOOT SINCE NEITHER EQUITABLE RELIEF NOR MONETARY DAMAGES IS AVAILABLE.

Not only is this case lacking in public importance, but it is moot as well.

A. Declaratory and Injunctive Relief.

Petitioners' request for "[a] clear pronouncement on the reach of the personal notice rule" (Petition, p. 30) is moot since enactment of Government Code §65091 requiring notice by mail. In light of the Legislature's action, it would be improper to declare the County's notice procedure unconstitutional, since there is no continuing violation of federal law to declare invalid, nor is there a continuing violation of federal law to enjoin. See Green v. Mansour, 474 U.S. ___, 88 L. Ed. 371, 106 S. Ct. ___ (1985) (class action regarding miscalculation of AFDC

benefits and right to notice of lost benefits). It would be meaningless to enjoin the County's former notice procedure, or to grant any other type of prospective relief. Nor is there any evidence of a threat of recurrence of allegedly unconstitutional notice practices. See Green v. Mansour, supra, at 380; Goodrich v. Gonzalez 451 F. Supp. 747, 750 (E.D. N.Y. 1978).

Furthermore, any attempt to now set aside the use permit granted in 1977 must clearly fail, as Petitioners themselves virtually concede ("Given the post-trial construction and operation of the sawmill, this case, upon remand, could include a request for damages from the County of Sonoma." Petition, p. 25. "A use permit deemed 'properly issued' swallows rights and enthrones the use permit holder with statutory and constitutional entitlements." Petition, p. 28. "While the wrong done in this case cannot necessarily be undone..." Petition, p. 29. "Upon retrial, the owner of the sawmill will undoubtedly urge equities associated with the passage of time

since the decision of the trial court and the completion of the sawmill in reliance upon the decision. Thus, upon retrial, the most appropriate remedy may be damages." Appellants' (Petitioners') Opening Brief, California Court of Appeal, p. 30.)

In summary, changes in state law have rendered moot Petitioners' claims for prospective relief, since the allegedly unconstitutional notice procedures are no longer in effect. And, Petitioners themselves recognize the futility of attempting to set aside the use permit after the construction and many years of operation of the sawmill.

B. Damages.

Since initiating this action in 1979, Petitioners have never stated a claim for damages against either the County or Loren Berry, owner of the sawmill and Real Party in Interest. Nonetheless, Petitioners suggest that upon remand they may be allowed to amend to request damages against the County. Petition, p. 25.

First, it is pure speculation to assume a court will in the future allow Petitioners to amend their action to state a monetary claim.

Second, under California law, the remedy of monetary damages is not available to landowners allegedly harmed by land use adjudications. Agins v. City of Tiburon 24 C 3d 266 (1979) held that an owner who is deprived of substantially all beneficial use of his land by a zoning ordinance is not entitled to an award of damages in an inverse condemnation proceeding. His exclusive remedy is invalidation of the ordinance in an action for mandamus or declaratory relief. This Court affirmed Agins, while leaving open the question of whether governments must pay damages to landowners whose property allegedly has been taken. Agins v. City of Tiburon 447 U.S. 255 (1980)[2]

[2]The issue has not yet been decided by this Court. Williamson Planning Commission v. Hamilton Bank 473 U.S. ___, 87 L. Ed. 2d 126, 105 S Ct. ___. (1985)

California courts have applied the rationale of Agins to land use adjudications in general, Palmer v. City of Ojai 178 Cal. App. 3d 280 (1986) (developer's action for mandate and damages for City's failure to issue building permit); to section 1983 claims, Palmer, supra; Gilliland v. County of Los Angeles 126 Cal. App. 3d 610 (1981); and to rent control ordinances, Fisher v. City of Berkeley 37 Cal. 3d 644 (1984), among other actions.

Petitioners may not recover monetary damages against Loren Berry, Real Party in Interest. Clearly, it is the government agency, not Berry, that owes the duty of constitutionally adequate notice. Even assuming arguendo, that Berry is somehow implicated in this Section 1983 action, he is not liable in damages to Petitioners. To establish personal liability in a Section 1983 suit against a public official, plaintiff must show that the defendant violated "clearly established" constitutional rights. Harlow v. Fitzgerald 457 U.S. 800 (1982).

Petitioners concede that "no court has yet ruled that the Mullane 'personal notice requirement' extends to land use adjudications". Petition, p. 21. Obviously, Petitioners had no "clearly established" right to notice by mail, and therefore, no individual can be held personally liable in this action.

CONCLUSION

This Court's limited judicial resources should be applied to cases that have broad significance beyond the interests of the particular litigants. Petitioners failed to bring to the Court's attention the subsequent legislation implementing the very standard that Petitioners espouse. Petitioners' case now has only isolated significance. Petitioners are entitled to a trial and to a careful appellant review, which they had. They are not entitled to a Supreme Court review, which is reserved for important questions of law for the public benefit.

Finally, this case has only academic significance even to the Petitioners.

Prospective declaratory or injunctive relief are meaningless in light of the new statute requiring notice by mail. Petitioners concede the unlikelihood of revocation of the use permit relied upon for many years by Berry, Real Party in Interest. Nor can Petitioners recover damages against the County or Berry, under established California and federal law. Petitioners do not have any real stake in this Court's decision. The case is moot.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

Thomas R. Kenney
Attorney for Real Party in Interest, Loren M. Berry

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_____/

CERTIFICATE OF SERVICE

BY MAIL

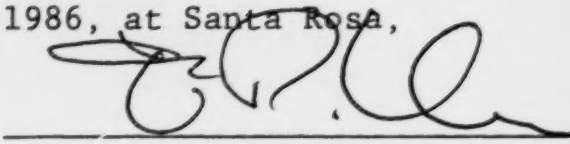
I hereby certify that I am a member of the U. S. Supreme Court bar and that I have on this date served a copy of the attached Real Party In Interest's Brief in Opposition to Petition for Writ of Certiorari by depositing it in the U. S. Mail, first class postage prepaid, at 730 Second Street, Santa Rosa, California, and addressed to:

Joseph Baxter, Esq.
Main Street
P. O. Box 37
Duncans Mills, CA 95430

Gregory P. Einhorn
Tarkington, O'Connor & O'Neill
350 E Street, Suite 200
Santa Rosa, CA 95404

I further certify that all parties required to be served have been served.

Dated: May 2, 1986, at Santa Rosa, California.



Thomas R. Kenney